91-1940

Supreme Court, U.S.
FILED
MAY 27 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALFRED H. GREENING, JR.,

Petitioner,

vs.

THOMAS J. MORAN, Individually and as former Chief Justice of the Supreme Court of Illinois, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ALFRED H. GREENING
Pro Se
P.O. Box 5
Williamsville, Illinois 62693
(217) 566-3314

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

Did the court of appeals deny due process and abridge free speech by imposing cumulative sanctions against an attorney-party and his attorney of record who invoked federal jurisdiction to protest actions of the Illinois Supreme Court, including:

a. suspension of the attorney-party's license to practice law indefinitely without a hearing, and

b. criminal contempt proceedings instituted against the attorney-party based on unauthorized practice of law without first providing a hearing on the prior suspension of his license?

PARTIES TO THE PROCEEDINGS BELOW

Alfred H. Greening, Jr. (Greening), the Petitioner in this action, was the Plaintiff-Appellant in the proceedings below. The respondents in this action, and the Defendant-Appellee's below are Hon. Thomas J. Moran, individually and as Chief Justice of the Supreme Court of Illinois (since having been replaced by Benjamin K. Miller as Chief Justice by change in office); James Bandy, Mary Robinson, Lester Asher, David Hartigan, Frederick T. King, Suzanne Barancik and John P. Clarke, individually, and as Chairman and members of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC); the Lawyers Trust Fund of Illinois, an Illinois not for Profit Corporation; and David C. Hilliard, Peter H. Lousberg, Frederick P. Velde, Michael A. Pope, David A. Decker, Randall A. Mead, Philip J. Rock, John J. Vassen and Jane Shaw Whitman, individually, and as the Board of Directors of Lawyers Trust Fund of Illinois.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The opinion and order sought to be reviewed is the opinion of the United States Court of Appeals for the Seventh Circuit, in cases 90-3784 and 91-3379, consolidated, decided January 8, 1992, before Easterbrook, Ripple, and Kanne, Circuit Judges. The opinion was final.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1992. (App. B). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves an interpretation and application of the Fourteenth Amendment to the U.S. Constitution which provides in pertinent part:

> * * * nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person the equal protection of the laws * * *.

STATEMENT OF THE CASE

A. LICENSE PROCEEDINGS

Petitioner, Alfred H. Greening Jr. (Greening) was an attorney in good standing in the State of Illinois for over forty years. No disciplinary proceedings were ever brought against him. Greening attempted to challenge the Illinois Supreme Court's power to raise revenue in violation of the Illinois Constitution.

> §1. State Revenue Power
>
> The General Assembly has the exclusive power to raise revenue by law except as limited or otherwise

> provided in this Constitution. The power of taxation shall not be surrendered, suspended, or contracted away.
>
> Ill. Const. Art. IX §1.

This issue has never been addressed by the Illinois Supreme Court in a reported decision. Greening protested by refusing to pay his annual fee to the Attorney Registration and Disciplinary Commission (ARDC), an agency of the Illinois Supreme Court. Greening also refused to become a participant in Lawyers Trust Fund, another agency created by order of the Illinois Supreme Court to raise revenue from interest earned from clients' trust funds.

Without a hearing, Greening was summarily removed from the ARDC roll of authorized attorneys. No hearing was afforded after his removal from the roll. Instead, a letter was issued notifying the chief judge of Greening's circuit that "Attached is a list of those individuals [of which Greening was one] in your circuit who * * * is engaged in the unauthorized practice of law." (Letter of Jerome Larken to the Honorable John W. Russell, May 11, 1989).

Thereafter the Supreme Court instituted an action against Greening to show cause why his license should not be suspended. Greening raised due process objections and demanded a hearing on the summary suspension of his license. At the same time he tendered a cashier's check in the total amount of fees and penalties then due, stating he could not ". . . afford the luxury of being able to forego the practice of law which he has been privileged to do for forty years, . . ." The Supreme Court refused Greening's check and he deposited the cashier's check in an escrow account in favor of the Illinois Supreme Court. The suspension action then laid inactive.

Subsequently, the Illinois Supreme Court instituted criminal contempt proceedings against Greening based upon his "unauthorized practice of law". No hearing was afforded on the due process grounds that Greening asserted against the summary suspension of his license. No hearing was afforded on his protest that the Illinois Constitution denied the court authority to assess the fee. At this point, Greening invoked the jurisdiction of the federal courts.

B. FEDERAL DISTRICT COURT PROCEEDINGS

Greening filed suit in federal court under 42 U.S.C. §1983 against the individual administrators of the Illinois Supreme Court and its agencies the ARDC and the Lawyers Trust Fund. On the date the federal suit was filed, March 19, 1990, Greening had been denied the right to practice law for several months and criminal contempt proceedings were pending against him. On June 3, 1990, Greening sought a preliminary injunction to prevent his continued "de facto" suspension from the practice of law without a hearing. The federal district court denied that request based upon representations from attorneys for the Illinois Supreme Court that Greening would be provided a due process hearing. The brief of the ARDC stated:

> In his complaint, plaintiff argues that he has been deprived of due process due to the lack of a hearing. A hearing date regarding plaintiff's activities as alleged in M.R. 5916 has been set for June 21, 1990. He will have the opportunity to raise all relevant issues in the state forum. Now that the hearing date is set, plaintiff asks this court to enjoin the very hearing which will afford him his due process guarantees.

The district court denied the preliminary injunction and delayed a final order on Greening's complaint until November 9, 1990, at which time it issued its opinion. In

that opinion the district court invoked the doctrines of abstention and lack of standing thereby avoiding the due process issues raised by Greening. In addition, it entered monetary sanctions against Greening and his attorney for raising issues in federal court without requisite standing. Appeal from the order imposing sanctions was consolidated in the Seventh Circuit.

During the several months these proceedings were pending before the federal district court Greening was denied a hearing on the "de facto" suspension of his license. During this same period criminal contempt proceedings premised upon that suspension proceeded to hearing.

C. CRIMINAL CONTEMPT PROCEEDINGS BEFORE THE ILLINOIS SUPREME COURT

On May 30, 1990, the Illinois Supreme Court ordered Greening to appear before Judge David Bone, a judge who sits in a trial court of original jurisdiction. Judge Bone was ordered to sit in a unique bifurcated criminal proceeding which resulted in several appearances before him and a final appearance before the Justices of the Supreme Court. Judge Bone adopted a memorandum letter finding: that there were no rules of procedure for the proceedings before him pursuant to Supreme Court's order; and, that the proceedings before him were original proceedings before the Supreme Court. (Letter Memorandum, addressed to Judge Bone, dated June 12, 1990, adopted June 15, 1990).

1) Proceeding of June 21, 1990

At the first hearing, Judge Bone found:

(a) That he "* * * gives special attention to the word "only" which directs the Court [Bone] to

make findings of fact on issues formed." (Bone tran., 6/21/90, p. 3, 1. 7-9)

(b) That the charge is indirect criminal contempt and "[t]he emphasis there is on 'criminal.' " (Bone tran., 6/21/90, p. 3, 1. 12)

(c) "* * * the burden would be upon the prosecuting authority to prove guilt * * * beyond a reasonable doubt which would be left for the Supreme Court to determine with this Court making only findings of fact" (Emphasis added) (Bone tran., 6/21/90, p. 3, 1. 21-24; p. 4, 1. 1)

(d) "* * * it's sui generis in that there is no right to trial by jury, as directed by the Supreme Court. Supreme Court has their own reason for that determination, apparently." (Bone tran., 6/21/90, p. 4, 1. 2-4)

Greening continued to challenge the constitutionality of funds raised by Supreme Court rule. (Bone tran., 6/21/90, p. 7, 1. 21); pointed out that payment of the challenged fee was tendered and rejected (Bone tran., 6/21/90, p. 8, 1. 12-16); that he was not afforded a hearing either before or after the de facto suspension of his license. (Bone tran., 6/21/90, p. 8, 1. 22-24; p. 9, 1. 1-2); and "* * * that we do not believe that any hearing which does not look at all of the elements in this situation can be a hearing which can pass due process under the State and Federal constitutions" (Bone tran., 6/21/90, p. 9, 1. 4-8). Greening also expressed concern that Judge Bone was unduly limited in his authority and that the hearing "* * * was not going to get to the real issues that created this whole situation in the first place." (Bone tran., 6/21/90, p. 9, 1. 18-21).

Greening reminded Judge Bone of the ARDC's statement in the Federal court proceedings that this hear-

ing would address "all relevant issues" and "afford him his due process guarantees". (Bone tran., 6/21/90, p. 9, l. 9-12). The ARDC restated that "* * * the proceeding as a whole would give the Defendant an opportunity to raise all of his issues, both of fact and of law, which we believe the questions of law are better raised and better decided by the Supreme Court * * * who has original jurisdiction * * * and inherent authority to act on the law and the facts in this case." (Bone tran., 6/21/90, p. 10, l. 22-24; p. 11, l. 1-5). The ARDC re-emphasized its position by stating: "* * * Mr. Greening would have the opportunity to raise all relevant issues in the State forum. He will be. He will raise all issues of law in the Illinois Supreme Court." (Bone tran., 6/21/90, p. 12, l. 1-3).

2) Proceeding of September 7, 1990

Greening moved for acquittal because the ARDC did not prove their charge beyond a reasonable doubt. (Bone tran., 9/7/90, p. 4, l. 20-24; p. 5, l. 1-4). In Response to this motion, the Court stated:

> * * * it's a difficult matter for the Court because I think my trained inclination, my experience, is to allow the motion, but I have this reservation by the direction from the Supreme Court. It is so limited that I believe that I am without discretion to do that which the Respondent would like the Court to do and which the Court would normally do in this proceeding." (Bone tran., 9/7/90, p. 12, l. 19-24; p. 13, l. 1-2).

Mr. Moran, the representative from the ARDC, dictated:

> In this case, * * * the Supreme Court handed down an order and said Judge Bone you will tell us the story of what went on here, the bare story without

making conclusions about what the story means or what the moral of the story is * * *. We believe that the intent is really a question of law that the Supreme Court can * * * decide when you told them the story of what went on * * *." (Bone tran., 9/7/90, p. 69, l. 13-24; p. 70, l. 1-10)

3) Proceeding of September 21, 1990

On October 4, 1990, Judge Bone filed his report (dated October 3, 1990) with the Illinois Supreme Court stating only: "[t]he facts with respect to whether Respondent engaged in the unauthorized practice of law * * * were found * * * beyond a reasonable doubt * * *." (Appendix F)

4) Briefs submitted to the Justices

After receiving Judge Bone's report, the Supreme Court established a briefing schedule limiting briefs to "* * * the issue of whether the Respondent [Greening] engaged in the unauthorized practice of law after his name had been removed from the Master Roll [for failure to pay the fee] * * *."

5) Finding of guilt by the Justices

On May 29, 1991, the Court, without receiving briefs on any constitutional issue found Greening guilty of indirect criminal contempt and fixed June 25, 1991 as the date for sentencing.

D. U.S. COURT OF APPEALS

1) The Merits

Judge Easterbrook allowed the motion of the ARDC to file the sentencing order of the Illinois Supreme Court which contained the following conclusory statement: "The

Court also has considered respondent's other constitutional challenges made throughout the course of these proceedings, and we find them to be without merit." (App. A, p. 4)

However, Judge Easterbrook refused to judicially notice or allow plaintiff to file the remainder of the transcript of proceedings where Greening was sentenced. (App. H). Those proceedings disclosed that no hearing was afforded on Greening's protest of the fee or the suspension of his license. The constitutional issues raised were never considered *and never addressed before that hearing.* Greening's attorney pointed this out after Greening was already found guilty during sentencing.

> Mr. Malany: If it please the court, I'm Lee Malany representing Mr. Greening.
>
> We find ourselves here today for a sentencing . . .
>
> As the record shows, Greening tried to raise with this court the very basic issue regarding the court's fee-raising procedures.
>
> Although a number of constitutional legal issues were concomitantly drawn into the controversy, the real focus became the issue of payment.
>
> * * *
>
> As recently as last Friday the ARDC has told the U.S. Court of Appeals that all of Greening's issues have been addressed and that due process has been taken care of. But before Judge Bone the ARDC told the judge that the judge could only address questions of fact and that all questions of law must be directed and were to be directed by the Supreme Court.
>
> Therefore, I ask directly, looking at this record and what has transpired, does this court believe it has now addressed all of the legal issues that Greening has raised?
>
> We think not.
>
> * * *

The ARDC responded:

> In light of the respondent's statement that the record is not clear that the court has rejected the various constitutional challenges interposed by the respondent in his answer to the rule to show cause, the administrator suggests that the court in its judgment specifically reject those constitutional challenges.
>
> That is the position of the administrator in this proceeding.
>
> Thank you. Report of Proceedings before the Illinois Supreme Court 6/25/91 (App. C, pp. 2-3, 6-7, 14).

After the refusal to allow judicial notice of the foregoing (App. I), Judge Easterbrook authored the court of appeals opinion stating: "The Supreme Court of Illinois rejected Greening's constitutional arguments on the merits—and if he withheld from the state tribunal some of the points he makes here, Greening has only himself to blame." (App. A, p. 6).

2) Sanctions

In the words of Judge Easterbrook, both the appeal on the merits and the appeal of Rule 11 sanctions entered in the district court were "frivolous". On its own motion, the court of appeals then assessed further sanctions against both Greening and his attorney, Malany under Rule 11. (App. A, pp. 9-11).

ARGUMENT

I.

FEDERAL COURT WAS THE ONLY APPROPRIATE FORUM TO REDRESS GREENING'S DENIAL OF DUE PROCESS.

(a) A Law License is a protected property right.

The right to engage in a lawful profession is a property right protected by the 14th Amendment. The minimum procedural requirements for impairment of this right is a matter of federal law which cannot be diminished by state action. *Vitek v. Jones*, 445 U.S. 480, 491 (1980); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Greening has a right to challenge a state court rule without reprisal. Under federal law, Greening's license could not be deprived without a hearing either, before the suspension or a prompt hearing afterwards. *Bell v. Burson*, 402 U.S. 534, 542-543 (1971). Where summary administrative action is substituted for due process injunctive relief is afforded in the federal court. *Supreme Ct. of Vir. v. Consumer Union*, 446 U.S. 719, 737 (1980); *Adams v. Atty. Reg. Dscpl. Comm.*, 801 F.2d 968, 974 (7th Cir. 1986).

The record clearly shows that Greening attempted to test the constitutionality of court rules 756 and 9-102(d) assessing fees and that the Illinois Supreme Court refused to provide a forum. It is irrelevant to federal due process that this challenge involved state issues. The Supreme Court's failure to provide a forum and its *de facto* suspension of Greening's license without a hearing violated due process. This was compounded by the Supreme Court's subsequent criminal prosecution of Greening for the un-

authorized practice of law after denying a hearing on his right to practice law. Criminal contempt proceedings were not instituted to provide Greening the due process hearing previously denied him, but to further punish him for raising issues the state forum refused to address.

(b) Criminal contempt proceedings did not address Greening's constitutional issues and therefore denied due process.

The Illinois Supreme Court ignored all issues Greening raised. By orders dated December 4 and December 27, 1990, the Supreme Court limited briefs to "whether or not the Plaintiff practiced law after removal from the Master Roll". (App. E).

Nevertheless, the ARDC previously urged dismissal of Greening's action in the District Court on the grounds that the Illinois court would provide a due process hearing on all of Greening's constitutional issues. Thereafter, the Illinois Supreme Court consistently refused to grant Greening a hearing on the validity of the license fee under the Illinois Constitution or the legal sufficiency of his *de facto* suspension.

The hearing which the Illinois Supreme Court provided to Greening was criminal in nature and conclusively presumed the validity of their prior summary administrative enforcement. After denying Greening's property right to his license, these proceedings threatened his personal liberty. Greening did not ask the Federal Court to resolve State issues, but rather to provide a forum subsequent to a summary taking of his license and prior to further punitive action.

The failure of the Illinois Supreme Court to provide a forum arises in part from the fact that the funds collected

by Judicial rules totals over $12,000,000 per year, all under its sole and its exclusive control. A disqualifying financial stake need not be direct or positive. The stake can occur even if the pecuniary interest is only an indirect outgrowth of a public official's desire to protect official funds or as here "court funds." *United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693, 699-700 (7th Cir. 1982); *Gibson v. Berryhill*, 411 U.S. 564, 571-572 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

A fair trial before an impartial tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias. The Illinois Supreme Court tried to avoid its clear conflict by refusing to address these issues and instead visiting reprisal upon any attorney who dared raise them in their forum.

(c) Abstention was not appropriate.

By specific order of the Illinois Supreme Court, all of the issues germane to Greening's constitutional rights were ignored. Since there was no hearing on his challenges to the fee or constitutional right to his license, there was no State proceeding from which the Federal Courts could abstain. Consequently, abstention should not have been an issue.

Greening did not seek to enjoin judicial disciplinary proceedings; Illinois disciplinary proceedings before the ARDC provide a whole host of procedural guarantees including a hearing and appeal. Greening complained of arbitrary summary administrative enforcement. Since Plaintiff's federal complaint is based on a continuing deprivation of a protected right *without a hearing*, the State interest in disciplining attorneys under its own procedure has no relevance.

Motions for abstention should be viewed narrowly. Abstention is an exception to the duty of a federal court to adjudicate a constitutional controversy. Abstention is only applicable to judicial proceedings where the subject matter in controversy is the same; it is inapplicable to administrative enforcement. The proceedings complained of were arbitrary administrative enforcement without an adjudication or hearing.

> If Prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed and * * * immunity does not shield the Virginia Court and its Chief Justice from suit * * * *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737 (1980).

Greening reiterates that he is not challenging the Illinois Supreme Court's right to proceed against him for the unauthorized practice of law or other misconduct. What he challenges is the State Courts failure to provide him a forum to raise basic federal and state constitutional issues before his livelihood is taken and his freedom threatened.

(d) Greening had standing.

There is no case law in the state of Illinois upholding the constitutionality of the Lawyers Trust Fund. This opinion finds a licensed attorney can only mount a constitutional challenge after he alleges non-compliance and subjects himself to administrative reprisal. Under such a rule a constitutional challenge would be converted into a defense of yet another prosecution that threatens property and liberty. This is clearly not the law of the Seventh Circuit. *Adams v. Atty. Reg. and Dscpl. Comm.*, 801 F.2d 968, 974 (7th Cir. 1986) or this court, *Sp. Ct. of Vir. v.*

Consumers Union, 446 U.S. 719, 737 (1980). Based upon this peculiar notion of standing, both the district court and court of appeals entered substantial monetary sanctions against Greening and his attorney.

II.

SANCTIONS CANNOT BE USED TO SILENCE POLITICAL DISSENT.

The challenge under the Illinois Constitution was not frivolous and had never been addressed by any court. Even if Greening is ultimately wrong, he has a federally protected right to raise that issue without threat of reprisal. To subject Greening to cumulative, punitive action for seeking refuge of the federal courts to protect his liberty and livelihood raises a further fundamental question: the constitutional propriety of the use of Rule 11 to exact cumulative sanctions to silence political dissent.

The judicial punishment imposed by the Illinois Supreme Court is "state action" that threatened both Greening's liberty and property without affording him a hearing. To seek the protection of the federal courts under those circumstances was not "frivolous" and should not be subject to cumulative, punitive reprisal.

> Whatever may be, or may have been true of suits against government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious. (*NAACP v. Button*, 317 U.S. 415, 439 (1963).

In Re Primus, 436 U.S. 412 (1978), reaffirmed and strengthened *Button*. Attorney Edna Smith Primus was charged by the Board of Commissioners on Grievances and Disciplinary of South Carolina, for apprising women

of the ACLU's offer to representation. Her reprimand was reversed by the Court because meaningful access to state courts is a fundamental right within the protection of the First Amendment. *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585 (1971). State courts are established to resolve political and constitutional disputes, not to ignore them. State and federal courts are not constitutionally empowered to punish those who call upon them to exercise their adjudicatory duties.

In the area of governmental conduct the stakes are arguably high and courts must not stifle enthusiasm for pursuing legal theories. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 834 (9th Cir. 1986). Failure to prevail is not the test for sanctions. Excessive sanctions can chill effective advocacy. Unpopular litigation always meets with an assault of traditional defenses. A good faith, vigilant plaintiff and his attorney, concerned for the propriety of governmental conduct should not be intimidated from testing state action under threat of federal sanctions.

Greening raised federal constitutional issues at the earliest stages of state proceedings and renewed them throughout his subsequent criminal prosecution, but to no avail. The Illinois Supreme Court's failure to address them after summary suspension of his license and instead assessing criminal sanctions is not consistent with due process. The federal court compounded this injustice by not only turning its back to these proceedings, but by imposing cumulative sanctions against Greening and his attorney.

According to a 1991 study performed by the American Judicature Society federal district courts in the Seventh Circuit assess Rule 11 sanctions more often than any other

circuit. The Seventh Circuit of Appeals has been so aggressive in assessing Rule 11 sanctions, *on its own motion*, that pressure was brought to bear on the court to provide "reasonable notice" rather than just assessing sanctions in its opinion on the merits, as in this case. New Circuit Court Rule 38, requires the court to give "reasonable notice" of its intent to impose sanctions. Reasonable notice was not given to Greening. Instead, he and his attorney were sanctioned without notice for appealing Rule 11 sanctions entered in the district court.

Greening's Petition for Rehearing with Suggestion for Rehearing in Banc addressed for the first time the cumulative effect of sanctions entered by the court of appeals. By its own rule, the Seventh Circuit can no longer assess sanctions on its motion and without notice. New Circuit Rule 38 was announced February 1, Greening's petition was denied several weeks later on February 27, 1992.

Perhaps the greatest injustice done to Greening was the distortion of the record before the Illinois Supreme Court. Judge Easterbrook not only closed his own eyes but also the eyes of other members of the court to the transcript of the record before the Illinois Supreme Court when he denied Greening's motion to supplement the record. (App. H). This action was after the ARDC was allowed to "supplement" the federal record with a conclusionary-bootstrap finding of the Illinois Supreme Court that it "considered" and "found without merit" all of Greening's constitutional issues (App. I). This gratuitous finding was by the Illinois Supreme Court at best an afterthought injected in the record of the sentencing hearing twenty seven days after Greening was notified he was found guilty by order (App. F). It was with full knowledge of these facts that Judge Easterbrook wrote "The Court also has considered

[Greening's] other constitutional challenges made throughout the course of these proceedings, and we find them to be without merit." (App. A, p. 4).

This is not the first time that the factual basis of an opinion by Judge Easterbrook has been challenged as an "ultimate injustice". See, *The Ultimate Injustice: When a Court Misstates the Facts*, Anthony D'Amato, Cardozo Law Review, Vol. 11:131, page 1313, 1990, reviewing Judge Easterbrook's handling of *Branion v. Gramly*, 855 F.2d 1256 (7th Cir. 1988); wherein Professor D'Amato said: "If the facts of a case conclusively prove that a certain thing did not happen * * * then the facts have to be changed in order to achieve a judge's desired results. In the *Branion* case, Judge Easterbrook rose to the intellectual challenge of the facts. He was able to write an opinion rationalizing his conclusion that Dr. Branion probably killed Donna Branion despite conclusive factual evidence that Dr. Branson could not possibly have committed the crime."

To deny a hearing is to deny due process. To distort a record to suggest that a hearing was afforded and thereby avoid adjudicating protected constitutional rights is an anathema to every concept of ordered liberties inherent in due process.

CONCLUSION

For the reasons stated, the writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit decided January 8, 1992 in cases 90-3784 and 91-3379, consolidated, should be issued.

Respectfully submitted,

ALFRED H. GREENING
Pro Se
P.O. Box 5
Williamsville, Illinois 62693
(217) 566-3314

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 90-3784 and 91-3379

ALFRED H. GREENING, JR.,

Plaintiff-Appellant,

v.

THOMAS J. MORAN, Individually and as former Chief Justice of the Supreme Court of Illinois, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 90 C 3071—**Richard Mills**, *Judge.*

ARGUED OCTOBER 30, 1991*—DECIDED JANUARY 8, 1992

Before EASTERBROOK, RIPPLE, and KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Some people are tax protesters. Alfred Greening is a fee protester. Greening, admitted to the bar of Illinois in 1949, refuses to pay the annual fee to the Attorney Registration and Disciplinary Commission and was removed from the ARDC's roll of authorized practitioners on March 1, 1989. Greening believes that he owes nothing because the fee was levied

* Appeal No. 91-3379 was submitted for decision without argument.

by the Supreme Court of Illinois rather than the state legislature, and that at all events fees should be collected by the court rather than the commission. Between 1978 and 1988 Greening sent checks for his annual fees made out to the Supreme Court, which endorsed them to the ARDC. In fall 1988 Greening did not complete his annual registration form or pay the annual fee for 1989. That ensured his removal from the rolls; under Ill. S. Ct. Rule 756 any member of the bar who neglects to pay the annual fee is suspended automatically until the sum (plus penalties) has been made good. In September 1989 Greening sent a cashier's check payable to the Clerk of the Supreme Court, which returned the instrument. (Greening placed this money, and the next year's payment, in escrow for the benefit of the court's Chief Justice.) Greening continued practicing law and has been convicted of contempt of court.

Greening says that he wants to vindicate the principle that governmental assessments must be authorized by the legislature and paid to governmental bodies. This is a proposition of state law—and the Supreme Court of Illinois has held that Greening misunderstands state law. Greening refuses to say die and filed this suit under 42 U.S.C. §1983. Victory would serve interests other than his own. If the Supreme Court must collect the dues, then Robert Cronson, the Auditor General of Illinois, may audit its receipts and disbursements, the gleam of his eye for years. See *Cronson v. Clark*, 810 F.2d 662 (7th Cir. 1987). Greening represented Cronson in that case, which we characterized as frivolous—so feeble that it did not even invoke the jurisdiction of the federal courts. All Greening has been able to achieve on his own behalf is to dig a deeper hole. The district court dismissed the complaint and awarded sanctions to some of the defendants under Fed. R. Civ. P. 11.

Greening filed suit against almost everyone having to do with the regulation of the bar in Illinois. His complaint names Justice Moran (Chief Justice of the Supreme Court

of Illinois at the time of filing), all of the members of the ARDC, and the Lawyers Trust Fund of Illinois (and members of its board of directors)—all in both individual and official capacities. He seeks substantial damages. The district court dismissed the complaint. 739 F. Supp. 1244 (C.D. Ill. 1990). The claims against the Trust Fund and its trustees failed for want of standing, and those against the Chief Justice and the members of the ARDC failed on twin grounds: absence of a claim on which relief may be granted, and abstention under *Younger v. Harris*, 401 U.S. 37 (1971).

The ARDC took Greening off its roll on March 1, 1989. A few months later the Administrator of the ARDC reported to the Supreme Court that Greening continued to hold himself out as a lawyer and asked the court not only to suspend him from its roll of attorneys but also to hold him in contempt of court. (The Supreme Court and the ARDC maintain separate lists of attorneys; the ARDC asked the Supreme Court to suspend Greening from its roll for the misconduct of practicing law while in default of dues.) Justice Ryan directed Greening to show cause why he should not be suspended. While the rule remained outstanding (Greening's response being a motion to vacate coupled with the checks made out to the Chief Justice and Clerk of the Supreme Court), and after the ARDC filed a supplemental report relating that Greening had appeared as counsel in an identified case, Greening filed this action under §1983.

Shortly after Greening commenced the suit, the Supreme Court of Illinois issued a rule ordering Greening to show cause why he should not be held in contempt in light of his appearance on behalf of a client. It appointed Judge J. David Bone as its special master. Greening responded by asking the district court to issue a preliminary injunction against the proceeding. The district court denied this motion and dismissed the case outright, leading to this appeal. Meanwhile the proceedings continued in Illinois. Judge Bone held a hearing and filed a report relating the facts of Greening's practice of law; the report

referred all legal issues to the Supreme Court. Greening and the ARDC filed briefs. In May 1991 the Supreme Court found Greening in contempt. After a separate oral hearing the court fined him $200. The final order of June 25, 1991, states in part:

> [Greening's] argument that removing his name from the Master Roll of Attorneys pursuant to the provisions of Supreme Court Rule 756 constitutes a violation of his due process rights because he is in compliance with "AN ACT to revise the law in relation to attorneys and counselors" (Ill. Rev. Stat. 1989, ch. 13, par. 1 *et seq.*) and because the procedures prescribed by the Act were not followed here is an argument without merit. It is well established that it is exclusively within the prerogative of the Supreme Court to determine who shall be admitted to practice law in Illinois. While the General Assembly may adopt acts which relate to the practice of law "[s]uch statutes are merely in aid of, and do not supersede or detract from, the power of the judicial department to control the practice of law." *People ex rel. Chicago Bar Association v. Goodman* (1937), 366 Ill. 346, 349.
>
> The Court also has considered [Greening's] other constitutional challenges made throughout the course of these proceedings, and we find them to be without merit.

The Supreme Court of the United States has denied Greening's petition for a writ of certiorari to review this decision. 60 U.S.L.W. 3359 (Nov. 12, 1991).

Greening insists that both the removal of his name from the ARDC's roll in 1989 and the contempt proceedings are unauthorized by Illinois law and violate the due process clause of the fourteenth amendment. He contends that the Supreme Court of Illinois could not afford him a fair hearing because it is interested in the outcome of a challenge to its own authority, that the lack of formal rules for the conduct of contempt proceedings makes the entire process unconstitutional, and that at all events the

Supreme Court's unwillingness to use the procedures provided by state statute violates the Constitution. Arguments of the last kind we have called frivolous as a matter of law, see *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081 (7th Cir. 1987), because the Supreme Court has held that the federal Constitution does not require states to follow their own procedural rules. The district court rejected this and all of Greening's other arguments on the merits, 739 F. Supp. at 1250-55, then added, *id.* at 1256, that the suit would fail in any event under *Younger* and *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). See also *Pincham v. Illinois Judicial Inquiry Board*, 872 F.2d 1341 (7th Cir. 1989).

Although we appreciate the judge's desire to demonstrate to other persons that claims of the sort Greening presses are doomed, it is not appropriate to address the merits in a case to which *Younger* applies. *Younger* does not pave a one-way street in which defendants may prevail on the merits but cannot lose. *Younger* abstention is appropriate only when resolution of the federal defenses belongs in the state forum. To say that abstention is in order then is to say that federal courts should not address the merits, period. *Silence* by the federal court is the objective of abstention; the desirability of silence is the reason for abstention. When there is an ongoing state proceeding, whether to abstain is the *first* question, and an affirmative answer brings the case to an end.

Abstention was appropriate in June 1990, when the district judge resolved the case. In August 1989, seven months before Greening commenced this suit, the Supreme Court of Illinois ordered him to show cause why he should not be suspended from practice. Such a proceeding, before the Supreme Court itself, is judicial in nature. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 477-79 (1983); *In re Summers*, 325 U.S. 561 (1945). Only seven days after Greening filed his complaint, the Supreme Court of Illinois directed him to show cause why

he should not be held in contempt of court. The contempt proceeding was criminal litigation, with the ARDC as prosecutor—and Greening acknowledged its judicial nature by asking the Supreme Court of the United States to review the ensuing fine. He wanted the district court to enjoin the contempt proceeding. *Younger* applies with full force to a request for an injunction against a criminal prosecution in which the state tribunal stands ready to entertain federal defenses. That the putative state defendant managed to get the federal suit under way first is inconsequential. *Hicks v. Miranda*, 422 U.S. 332, 348-50 (1975).

Now that the state proceeding has reached its end, abstention is no longer appropriate. The Supreme Court of Illinois rejected Greening's constitutional arguments on the merits—and if he withheld from the state tribunal some of the points he makes here, Greening has only himself to blame. We apply the same rules of preclusion Illinois uses. 28 U.S.C. §1738; *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984). In Illinois, a final decision is preclusive not only on claims and defenses actually presented but also those that could have been presented. E.g., *Frier v. Vandalia*, 770 F.2d 699 (7th Cir. 1985), and *Button v. Harden*, 814 F.2d 382 (7th Cir. 1987), both collecting Illinois cases. Greening could not undertake fresh litigation in Illinois seeking a declaration that he is entitled to practice law without paying the annual fee, or damages from members of the ARDC. So Greening loses outright—but on claim preclusion (res judicata), rather than on an independent federal consideration of the merits.

So far, our discussion has dealt only with Greening's claims against the ARDC and Justice Moran. None of the proceedings in state court concerned the Trust Fund. The district judge rightly dismissed Greening's claims against the Trust Fund and its directors for want of a case or controversy. Rule 1.15(d) of the Rules of Professional Conduct issued by the Supreme Court of Illinois requires lawyers to deposit funds held for their clients in interest-

bearing trust accounts. The interest from these accounts is to be turned over to the Trust Fund, which uses the money to assist indigent litigants. Greening lacks a justiciable dispute with the Trust Fund, the district court held, because he has not alleged that he possesses any client funds covered by Rule 1.15(d). 739 F. Supp. at 1254-55. "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The court thought that Greening failed at every step. After it dismissed the complaint Greening filed an affidavit stating that "he has maintained an account during his practice of 40 years that could qualify as an account subject to" Rule 1.15(d). The district court thought this insufficient, writing that it is "untimely, ambiguous, and contradicted by Greening's previously stated position." Nothing in the complaint or affidavit, the district court held, establishes a concrete controversy. This shortcoming is so apparent, it thought, that sanctions under Rule 11 are in order. The court ordered Greening to pay $8,737.74 to offset part of the expenses the Trust Fund and its members incurred in defending against his claims.

Complaint, affidavit, and appellate briefs together fall short of establishing a case or controversy between Greening and the Trust Fund. The Fund has never claimed entitlement to interest from any client funds Greening holds—if indeed Greening holds any. His affidavit does not say that Greening possesses one penny of client trust funds or anticipates receiving any in the future. Greening's affidavit contains no *facts*; he offers only a bare conclusion that an "account" of unknown attributes "could" be within the rule. Although failure to comply with Rule 1.15(d), or any other of the state's ethical rules, may lead to discipline, no proceeding charging noncompliance with Rule 1.15(d) is under way or in the offing. One of Greening's appellate briefs shows his thinking: "Greening challenged all revenue raising by court rule not authorized by the State Constitution or legislative enactment. Therefore, the subject

matter of his challenge necessarily included the Lawyer's Trust Fund." In addition to revealing that his objection to the Trust Fund is grounded in state law, this says that Greening sued the Fund not because of a concrete controversy but because he sought to cover the waterfront. A litigant's desire to vindicate a position does not establish standing. *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990); *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

Even if we take the affidavit for all it could be worth, and acknowledge Greening's concern that state officials may try to retaliate against him for suing Justice Moran and the ARDC, still Greening has no dispute *with the Trust Fund*. The Fund is a depository. Its board does not initiate or decide disciplinary matters. Initiation and prosecution are functions of the ARDC, decision a function of the judiciary. If Rule 1.15(d) is unconstitutional, relief would run against the ARDC or court. Greening is not entitled to the interest, which belongs to his clients if not to the Fund. He has never attempted to grapple with the implications of the fact that his dispute is not with the designated recipient of the interest.

Judge Mills found that by filing the complaint without investigating the problem of standing, and without alleging that he had any funds subject to Rule 1.15(d), Greening and his lawyer LeGrand L. Malany violated Rule 11. Their brief on appeal from the order awarding the sanction reargues the substance of the standing decision. They neither acknowledge the deferential standard of appellate review, see *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2457-61 (1990), and *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) (in banc), nor try to show that the district court abused its discretion. Much of their submission actually supports the district court's decision. They pin their argument for standing on an asserted fear that "the [Supreme] Court would retaliate against [Greening] for raising issues it refused to address." This has nothing to do with the Fund; Greening does not

assert that he feared that *it* would retaliate, and at all events even well-grounded fear justifies no more than an injunction. Yet his complaint did not ask for an injunction against the Fund or its directors; instead Greening demanded $775,000 in damages from the directors, who he named in their individual as well as their official capacities. Three of the nine persons Greening named as defendants (David C. Hilliard, Peter H. Lousberg, and John J. Vassen) were not directors at the time of the complaint, so damages for past wrongs is the only relief Greening seeks from them. Yet although Greening has never identified any wrong these persons committed, he has retained them as parties. Even by the standards of Greening's professed objectives, his complaint is an inexcusably slipshod document.

The directors' brief in this court puts the matter aptly: "The two attorneys [Greening and Malany] . . . have cost the needless expenditure and diversion of funds earmarked for legal services to the indigent and the defense of personal liability claims against fellow practitioners who have volunteered their time and expertise to the administration of that program." Rule 11 requires pre-filing investigation of both factual and legal aspects; the district court found that no such investigation preceded this suit. The court did not abuse its discretion in awarding sanctions. (Greening and Malany do not contest the amount.)

Sanctions under Rule 11 are not the end of the matter. The Trust Fund will not retain the full value of the sanction (and thus indigent litigants who are the Fund's beneficiaries will be worse off) if it is out of pocket the costs of defending Greening's appeals. Yet appeals need not erode the value of the award to the wronged party. Frivolous appeals are sanctionable under Fed. R. App. P. 38. The Supreme Court observed in *Cooter & Gell*, 110 S. Ct. at 2462, that "courts of appeals have ample authority to protect the beneficiaries of Rule 11 sanctions by awarding damages and single or double costs under Rule 38—which they may do, as we have noted, when the appellant had no reasonable prospect of meeting the difficult stan-

dard of abuse of discretion." Greening and Malany, who have not even *acknowledged* that appellate review is deferential, "had no reasonable prospect of meeting the difficult standard of abuse of discretion."

The frivolous appeal on sanctions is the capstone of litigation that is hollow in every particular. We told Greening in *Cronson v. Clark* that who has the power to assess and collect annual fees from the Illinois bar is a question of Illinois law. Greening is back, with a different patina but the same agenda—to "challenge[ ] all revenue raising by court rule not authorized by the State Constitution or legislative enactment." His arguments against the ARDC included one that *Szabo* held sanctionable as a matter of law, plus others that had no prospect of escaping *Younger* let alone of succeeding on the merits. These appeals have done nothing beyond heaping extra litigation expense on the defendants. Litigants ordinarily bear their own costs, but Greening has multiplied the proceedings, adding a federal overlay to the ongoing state case. Cf. *Wisconsin v. Glick*, 782 F.2d 670 (7th Cir. 1986); *In re TCI Ltd.*, 769 F.2d 441 (7th Cir. 1985). Costs attributable to that multiplication properly are borne by Greening and Malany. The outcome of these appeals was "foreordained by the lack of substance to the appellant[s'] arguments." *Mars Steel*, 880 F.2d at 938. We conclude that both appeals are frivolous and that the appellees are entitled to damages under Rule 38 and 28 U.S.C. §1927 equal to the legal fees and other expenses they have incurred in this court. Greening and Malany are jointly and severally liable for these damages. Appellees have 15 days to submit statements of the fees and costs reasonably incurred.

AFFIRMED, WITH SANCTIONS

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 27, 1992

Before
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

Nos. 90-3784 and 91-3379

Alfred H. Greening, Jr.,

Plaintiff-Appellant,

v.

Thomas J. Moran, Individually and as former Chief Justice of the Supreme Court of Illinois, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 90 C 3071—Richard Mills, Judge.

Order

Plaintiff-Appellant filed a petition for rehearing and suggestion of rehearing en banc on January 22, 1992. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED. Judge Wood did not participate in the consideration or decision of this case.

APPENDIX C

[Dated July 22, 1991]

IN THE SUPREME COURT OF ILLINOIS

M.R. 5916

In re:	)	
	)	Atty. Reg.
Alfred H. Greening, Jr.	)	& Disc. Comm.
	)	89 CH 425

REPORT OF PROCEEDINGS of the hearing before the Illinois Supreme Court on the 25th day of June, 1991.

APPEARANCES:

MR. JEROME LARKIN,
for the Fee Administrator.

MR. LeGRAND MALANY,
for the Respondent.

Jerry Wedeking, CSR, RPR
Official Court Reporter County Building
Springfield, Illinois 62701

THE COURT: The next matter is M.R. 5916, In Re. Alfred H. Greening, Jr.

MR. MALANY: If it please the court, I'm Lee Malany representing Mr. Greening.

We find ourselves here today for a sentencing in which the questions was created—the case in the first instance to (unintelligible) to be addressed.

As the record shows, Greening tried to raise with this court the very basic issue regarding the court's fee raising procedures.

Although a number of constitutional legal issues were concomitantly drawn into the controversy, the real focus became the issue of payment.

Judge Bone noted that payment was an issue in his hearings but that he could not address that issue because he was limited only to the findings of fact based on Greening's conduct after it had been removed if from the master roll.

Therefore, Judge Bone did not address the issue of payment, and this court excluded the issue of payment by limiting briefs and arguments to whether Greening engaged in the unauthorized practice of law after his name had been removed from the master roll.

This court never addressed the issue of the concomitant issue also of whether Greening should have automatically have been reinstated on the master roll after he made his payments.

These issues were bypassed completely.

On the issue of intent, remembering that this is a case of indirect criminal contempt, Judge Bone determined that he could not find on that issue.

Even though intent is a question of fact for the trier of fact, Judge Bone then determined that he could not make any finding with regard to intent because that issue had to be brought to the Supreme Court. Therefore, Judge Bone did not make any finding on intent, and this court has never addressed that issue or made that finding.

Yet the law is clear that in order to support a finding of indirect criminal contempt there must be a finding that the perpetrator was contumacious of the court or it acted with the intent to bring the court in disrepute.

That fact has never been determined. Bone made no findings as to whether Greening had engaged in the unauthorized practice of law. Bone could not make that type of finding because he had determined that his authority was limited only to facts, and the determination of the unauthorized practice of law was a combination of fact and law.

This court has made no findings regarding the unauthorized practice of law.

In its order on May 29th this court merely states that it has been established beyond a reasonable doubt that there was the unauthorized practice of law, but there is nothing to tell us who has made this establishment.

In the course of presenting the fee raising issue the actions of this court and in particular its agents, the ARDC, have precipitated a series of constitutional issues, all of which have yet to be addressed and all of which have been conceded as having been raised.

These issues include whether or not the ARDC can usurp the power of the states attorneys and institute actions for the unauthorized practice of law on their own or whether the ARDC can recommend disciplinary actions without first going through the disciplinary procedures established in the Supreme Court Rules.

I would also point out that all of the actions by the ARDC and all the actions that bring us here today are based upon and emanating from the payment of a fee.

Mr. Greening has never been charged with improper conduct as an attorney.

The court's order for today characterizes Judge Bone's hearings as actions in the circuit court, but Bone determined at the very start of the hearings in an order that he signed that the action that he was undertaking was

not in the circuit court, that he was not sitting as a circuit court judge, and that he considered his actions as actions in the Supreme Court. He was acting as a surrogate for the Supreme Court in his mind.

Bone, in fact, considered his authority so limited that when he was presented with a motion by Greening at the close of the prosecution's case for a ruling on the sufficiency of that case before the defendant undertook the burden of going forward that he could not make that determination.

In fact, he specifically stated in the record that his own training and his own inclination would be to grant that motion but that he couldn't do it because his authority was so limited by the order of the court establishing the hearings in the first instance.

Greening was there for his right to defend without first the finding of the sufficiency that there was anything to defend against.

Greening never acted in a manner that was contumacious of this court. Taken in the background of this case and the issues that presented this case, the record supports the proposition that Greening attempted at all times in a way that was not contumacious of the court. All he wanted this court to do was to provide an objective and appropriate form to address his legal challenge, and in the context of trying to do that he tried in every manner to endeavor not to do anything that would be considered as bringing even the legal profession into disrepute or to be deemed in derogation of this court or the status of this court, but he did, of course, challenge strongly the issue that he originally raised.

In fact, in the federal court this court through its agents consistently state that Greening's rights would be protected and that his legal issues would be addressed.

As recent as last Friday the ARDC has told the U.S. Court of Appeals that all of Greening's issues have been addressed and that due process has been taken care of. But before Judge Bone the ARDC told the judge that the judge could only address questions of fact and that all questions of law must be directed and were to be directed by the Supreme Court.

Therefore, I ask directly, looking at this record and what has transpired, does this court believe it has now addressed all of the legal issues that Greening has raised?

We think not.

We are now poised to institute a sentencing in a proceeding in which serious questions of due process from a criminal trial are now present and in which the real pointed issue has yet to be addressed, and at no time has Mr. Greening again ever acted contumaciously toward this court, and without the finding of intent and without the direct finding of fact on the unauthorized practice of law it would seem that it would be inappropriate at this time to now sentence this individual for trying to raise a question.

If the court has any questions—otherwise I'm through.

THE COURT: Thank you very much.

MR. LARKIN: May it please the court, my name is Jerome Larkin. I represent the fee administrator in this proceeding. The administrator takes issue with the respondent's statement that the constitutional challenges he set forth in his answer to the rule to show cause at issue in the proceeding have not been addressed by this court.

In his order of May 29th, 1991 this court specifically indicated that it had considered the answer to a rule to show cause filed by the respondent and then it went on

to determine—and it is the court's determination by terms of the order—that had been established the respondent engaged in the unauthorized practice of law beyond a reasonable doubt.

Clearly the court by its order and prior to a determination of the unauthorized practice had concluded that the various challenges of the constitutional nature raised by respondent were without merit.

Similarly, the court had before it the factual findings made by Judge Bone in the entire record.

The administrator takes the position that the finding of the requisite mental state is part and parcel of this court's determination reflected in the order of May 29 of this year.

This, of course, is the indirect criminal contempt proceeding, and we're here for sentencing and the authorized sentence can be a find of up to $500 and a period of incarceration up to six month.

The facts do show a contempt for the court and the processes this court has established to regulate the legal profession.

As the conduct of the respondent offends the dignity of this court in one of its crucial rolls, the administrator believes it's the court itself that can best judge the appropriate sanction.

The administrator does suggest, however, that judgment be entered and that the sanction be a minimum of a $500 fine.

The facts established in this proceeding do reflect a conscious disregard for the processes of this court and a refusal by the respondent to register under Supreme Court Rule 756.

Under Rule 756 respondent is required to register and pay to the Commission annually a registration fee, yet steadfastly refuses to do this and has indicated his disdain for the court's processes by his refusal to do this even in light of the court's order of September 27th of 1989 affording him an opportunity to pay to the Commission the appropriate fee.

THE COURT: Well, speaking correctly, he's not required to register to pay a fee unless he wishes to maintain his license and continue to practice law. No one has to keep paying fees if they're not going to practice law.

MR. LARKIN: I think the rule in its first paragraph imposes a duty upon every lawyer admitted.

It does say that every lawyer admitted must pay.

THE COURT: Well, I would take issue with you.

MR. LARKIN: Well, I don't mean to quibble exactly what's material to the ultimate decision in this case.

In any event the rule has an automatic sanction in it.

If a lawyer does not register and pay, the lawyer is not authorized to practice law, and we get to the facts that forms some basis of the indirect criminal contempt proceedings at this juncture.

The respondent clearly engaged in the unauthorized practice of law following his removal from the roll on March 1st of 1989.

From that time until at least October 20th of 1989 he maintained an appearance in a probate case.

He represented the independent administrator in the Estate of William Halbert.

Helen Halbert had hired him prior to February 19th of 1988 to represent her in probating her deceased hus-

band's estate. She paid him a fee. She expected that he would do what was necessary to probate the case.

In initiating the proceedings the respondent himself described himself as her attorney.

The respondent after March 1 continued to practice law. He never withdrew his appearance in that case, and he on March 6th of 1989 obtained from the Internal Revenue Service a letter determining that no tax was due from the estate.

Sometime prior to October 20th of 1989 Helen Halbert began to request the respondent to close the estate. She, of course, was not a lawyer. She didn't know whether what was required to close the estate, but she knew that there could be no impediment to closing it in a practical sense. She was the sole heir. The estate was—the value was in excess of a million dollars. It was ready to be closed.

The reason for the delay became obvious. She acknowledges the respondent told her that he might have a problem in closing the estate.

Well, the problem was his refusal to register. And keep in mind that just a short period earlier he had ignored this court's opportunity afforded to him to register and to pay the Commission and be restored to the master roll.

In any event Mr. Greening went forward.

He prepared a final account, met with Helen Halbert, presented that final account, filed it and then presented it to Judge Friedman, the Circuit Court of Sangamon County, seeking that it be approved.

Now, Judge Friedman correctly determined that he could not allow Mr. Greening to obtain the approval, be-

cause that would be a further evidence of the practice of law and violate the Supreme Court Rule 756.

In any event after Judge Friedman disallowed the respondent further activity in the estate, he obtained separate counsel for Helen Halbert, and the estate was closed.

As of today's date, Mr. Greening still has not paid to the Commission a registration fee and still is not authorized to practice law in this state.

In determining the appropriate sentence the administrator suggests there are four aggravating factors:

The first is that respondent has demonstrated a conscious and a (unintelligible) disregard for the mandates expressed in Rule 756, register and pay annual fees.

The unauthorized practice of law continued for a period of seven months following removal on March 1st.

The estate was compromised because its closing was delayed by respondent's own personal problem, and, of course, respondent used his activities and his effort to get the estate closed to justify the fee he obtained from Helen Halbert.

There are other factors, of course, to consider.

Respondent, as long seen, will not register. He is not authorized to practice law and represents little threat actually for further unauthorized practice.

He has no prior discipline. He has been a good attorney four almost—for about 42 years, and the administrator suggests considering all of the facts before the court that the court impose judgment of contempt and at the minimum impose a fine of $500.

In light of the respondent's statement that he record is not clear that the court has rejected the various con-

stitutional challenges interposed by the respondent in his answer to the rule to show cause, the administrator suggests that the court in its judgment specifically reject those constitutional challenges.

That is the position of the administrator in this proceeding.

Thank you.

THE COURT: Any rebuttal?

MR. MALANY: I'll make some very quick points.

On the question of intent it appears that we have two levels of intent or two types of intent.

There is the intent to act contumacious to the court, which is the intent that is required in order to have indirect criminal contempt.

Then there is the intent that is sprinkled throughout the ARDC's brief, and that is the intent to practice law.

I maintain that it's the intent to be contumacious of this court that has to be found before there can be a criminal conviction on indirect criminal contempt that has not and has yet to be determined.

With regard to registration, Mr. Greening was registered. The registration was accepted, and that registration was succeeded as being accepted by the ARDC.

In effect, in a federal lawsuit which is currently going on, he never refused to register. There was a delay may be in the time he registered, but he had never refused to register.

On the issue of payment, when this case first started, M.R. 5916, there was a petition by the ARDC to hold Greening in contempt. Two days or three days later that petition was amended to have him suspended.

This court issued an order for him to show cause why he should not be suspended, which, by the way, has also never been acted on.

In the course of answering that charge—of that so-called charge Greening stated specifically that he could not afford not to practice law, therefore, tendered his payment to the court that he was then before in a controversy dealing with the payment.

The legal issues involving that have never been addressed.

With regard to the Halbert case the record clearly shows, first of all, that he had talked with Helen Halbert way before she had ever asked him to close the case back of January of '89, and told him that he may not be able to handle the case, depending on what happened with this controversy before the Supreme Court.

Later on, as the record also shows, Halbert said she needed to have the case closed, did not explain why. He had then informed her of the same thing, that he may have a difficulty because of the controversy.

He had already tendered check to this court.

He went to Judge Cavanagh, who was the Chief Justice of the circuit and to whom had been the recipient of a letter from the ARDC informing him that Greening, in basic words, was not allowed to practice law. Although artfully drafted, that was the import of the letter.

He asked Judge Cavanagh if he could practice before his court given the status of the case at this point.

Cavanagh said he could not practice before Cavanagh but that it was every judge's decision individually as to what else to do.

He therefore went a day ahead of time, as the record also shows that he made two appearances before Judge Friedman, to tell Judge Friedman that the problem was coming up and to give him the file on his case before the Supreme Court and the ARDC.

He then went back the next day to find the judge's answer to that question.

He never intended to practice law if it was decided that he could not do so or one of the judges felt that he couldn't given the ambiguities that existed at the time with regard to payment.

There is nothing in the record, contrary to what was heard here, that the Halbert case itself was compromised, that it was delayed, or that anything was improper or that that client was harmed.

I have nothing else, your Honors.

THE COURT: Thank you very much.

The court will take a very brief recess.

The parties and the attorneys have to remain in the courtroom while we will return shortly.

(A short recess was taken.)

THE COURT: The court has adopted the following order:

Respondent Alfred H. Greening, Jr. having been held in indirect criminal contempt of court on May 29, 1991 for engaging in the unauthorized practice of law after his name was removed from the master roll of attorneys on March 1st, 1989, respondent and the representative of the administrator having appeared for sentencing on this contempt on June 25, 1991, and the court being fully advised in the premises;

The court reiterates its finding that it has been established beyond a reasonable doubt that respondent engaged in the unauthorized practice of law after his name was removed from the master roll of attorneys.

Specifically, respondent performed the following acts after March 1st, 1989 in the Halbert Estate case, Sangamon County Number 89-P-97, which constitute a practice of law:

1. Advised the estate administrator of the proper procedures for closing an estate under the Probate Act of 1975;

2. Prepared a final accounting presumably as required by Section 24-1 of the Probate Act of 1975; and

3. After obtaining the signature of the estate administrator on the final accounting, presented it to Judge Friedman.

The court also finds that respondent's argument that removing his name from the master roll of attorneys pursuant to the provisions of Supreme Court Rule 756 constitutes a violation of his due process rights because he is in compliance with "AN ACT to revise the law in relation to attorneys and counselors" (Illinois Revised Statutes, 1989, Chapter 13, paragraph 1, et seq.) and because the procedures prescribed by the Act were not followed here is an argument without merit. It is well established that it is exclusively within the prerogative of the Supreme Court to determine who shall be permitted to practice law in Illinois. While the General assembly may adopt acts which relate to the practice of law "such statutes are merely in aid of, and do not supersede or detract from the power of the judicial department to control the practice of law." People ex rel. Chicago Bar Association vs. Goodman (1937), 366 Illinois 346, at page 349.

The court also has considered respondent's other constitutional challenges made throughout the course of these proceedings, and we find them to be without merit.

Therefore, respondent is sentenced as follows:

Respondent is fined in the amount of $200 to be paid to the Clerk of this Court on or before July 25, 1991.

The rule to show cause that issued to the respondent on August 7th, 1989 is discharged, having been superseded by the rule to show cause enforced on May 29th, 1991.

Madam Marshal, the Supreme Court stands in recess until tomorrow morning at 9:00 a.m..

(Which were all the proceedings had in this cause on this date.)

IN THE SUPREME COURT OF ILLINOIS

M.R. 5916

I, Jerry Wedeking, an Official Court Reporter and Certified Shorthand Reporter for the State of Illinois, do hereby certify that I transcribed the proceedings had on the hearing in the above-entitled cause from an audio tape; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the audio-taped proceedings had before the Supreme Court of Illinois on June 25, 1991 in said cause.

/s/ Jerry Wedeking
Official Court Reporter

Dated this 22nd day of July, 1991.

APPENDIX D

[Filed May 30, 1990]

M.R. 5916

IN THE
SUPREME COURT OF ILLINOIS

In re:	)	
	)	Atty. Reg.
Alfred H. Greening, Jr.,	)	& Disc. Comm.
	)	89 CH 425
Respondent	)	
	)	

ORDER

The Administrator of the Attorney Registration and Disciplinary Commission having alleged in a verified supplemental report filed with the Court on February 13, 1990, that respondent Alfred H. Greening, Jr. has engaged in the unauthorized practice of law after his name was removed from the Master Roll of Attorneys on March 1, 1989, pursuant to Supreme Court Rule 756 for failing to register and pay the registration fee for the year 1989, and respondent having answered the rule to show cause that issued to him on March 26, 1990, directing him to show cause why he should not be held in indirect criminal contempt of Court for engaging in the unauthorized practice of law;

It is ordered that the rule to show cause is continued, and that respondent and the representative of the Attorney Registration and Disciplinary Commission appear before the Honorable J. David Bone, Judge of the Seventh Judicial Circuit, in Room D, Third Floor, of the Sangamon

County Courthouse at 9:30 A.M. on Thursday, June 21, 1990, for the purpose of an evidentiary hearing in which only findings of fact shall be made on the issues formed by the Administrator's verified report and the respondent's answer to the rule to show cause. The transcript of the proceedings before Judge Bone shall be filed with the Clerk of this Court.

Miller, J. took no part.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court this 30th day of May 1990.

/s/ JULEANN HORYNAK Clerk,
Supreme Court of the State of Illinois.

APPENDIX E

[Filed December 27, 1990]

M.R. 5916

IN THE
SUPREME COURT OF ILLINOIS

In re:	)	
	)	Atty. Reg.
Alfred H. Greening, Jr.,	)	& Disc. Comm.
	)	89 CH 425
Respondent	)	
	)	

ORDER

The motion by respondent Alfred H. Greening, Jr. to vacate the briefing schedule of December 5, 1990, and to set a new schedule is allowed. The brief of the Administrator of the Attorney Registration and Disciplinary Commission on the issue of whether respondent engaged in the unauthorized practice of law after his name was removed from the Master Roll of Attorneys on March 1, 1989, is due on or before January 31, 1991, and the brief of respondent is due on or before March 7, 1991.

Moran, C.J. and Miller, J. took no part.

APPENDIX F

[Filed May 29, 1991]

IN THE SUPREME COURT OF ILLINOIS

M.R. 5916

In re:	)	
	)	Atty. Reg.
Alfred H. Greening, Jr.,	)	& Disc. Comm.
	)	89 CH 425
Respondent	)	
	)	

ORDER

This cause having come for consideration on this Court's rule to show cause, the factual findings made by the Circuit Court of the Seventh Judicial Circuit on the issues formed by the verified supplemental report filed by the Administrator of the Attorney Registration and Disciplinary Commission and the answer to the rule to show cause filed by respondent Alfred H. Greening, Jr., and on the briefs filed by the parties, and this Court being fully advised in the premises;

It is the determination of this Court that it has been established beyond a reasonable doubt that respondent engaged in the unauthorized practice of law after his name was removed from the Master Roll of Attorneys on March 1, 1989. The rule to show cause that issued to respondent on March 26, 1990, is enforced, and respondent is held in indirect criminal contempt of Court for engaging in the unauthorized practice of law. Respondent and the representative of the Administrator are directed to appear for sentencing on this contempt on Tuesday, June

25, 1991, at 3:00 P.M. in Springfield. Arguments will be limited to ten minutes for respondent, ten minutes for the Administrator, and five minutes for respondent's rebuttal.

Miller, C.J. and Moran, J. took no part.

APPENDIX G

[Filed June 25, 1991]

IN THE SUPREME COURT OF ILLINOIS

M.R. 5916

In re:	)	
	)	Atty. Reg.
Alfred H. Greening, Jr.,	)	& Disc. Comm.
	)	89 CH 425
Respondent	)	
	)	

ORDER

Respondent Alfred H. Greening, Jr. having been held in indirect criminal contempt of Court on May 29, 1991, for engaging in the unauthorized practice of law after his name was removed from the Master Roll of Attorneys on March 1, 1989, respondent and the representative of the Administrator having appeared for sentencing on this contempt on June 25, 1991, and the Court being fully advised in the premises;

The Court reiterates its finding that it has been established beyond a reasonable doubt that respondent engaged in the unauthorized practice of law after his name was removed from the Master Roll of Attorneys; specifically, respondent performed the following acts after March 1, 1989, in the Halbert Estate case (Sangamon County No. 88 P 97) which constitute the practice of law:

1. Advised the estate administrator of the proper procedures for closing an estate under the Probate Act of 1975 (Ill. Rev. Stat. 1989, ch. 110½, par. 1-1 *et seq.*);

2. Prepared a final accounting presumably as required by Section 24-1 of the Probate Act of 1975 (Ill. Rev. Stat. 1989, ch. 110½, par. 24-1); and

3. After obtaining the signature of the estate administrator on the final accounting, presented it to Judge Friedman.

The Court also finds that respondent's argument that removing his name from the Master Roll of Attorneys pursuant to the provisions of Supreme Court Rule 756 constitutes a violation of his due process rights because he is in compliance with "AN ACT to revise the law in relation to attorneys and counselors" (Ill. Rev. Stat. 1989, ch. 13, par. 1 *et seq.*) and because the procedures prescribed by the Act were not followed here is an argument without merit. It is well established that it is exclusively within the prerogative of the Supreme Court to determine who shall be permitted to practice law in Illinois. While the General Assembly may adopt acts which relate to the practice of law "[s]uch statutes are merely in aid of, and do not supersede or detract from, the power of the judicial department to control the practice of law." *People ex rel. Chicago Bar Association v. Goodman* (1937), 366 Ill. 346, 349.

The Court also has considered respondent's other constitutional challenges made throughout the course of these proceedings, and we find them to be without merit.

THEREFORE respondent is sentenced as follows:

Respondent is fined in the amount of two hundred dollars ($200), to be paid to the Clerk of this Court on or before July 25, 1991.

The rule to show cause that issued to respondent on August 7, 1989, is discharged, having been superceded by the rule to show cause enforced on May 29, 1991.

Miller, C.J., and Moran, J. took no part.

APPENDIX H

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 27, 1991

Before
Hon. Frank H. Easterbrook, Circuit Judge
Hon.
Hon.

Alfred H. Greening, Jr.,
Plaintiff-Appellant,

No. 90-3784 v.

Thomas J. Moran, Honorable, individually, and as Chief Justice of the Supreme Court of Illinois, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 90 C 3071—Richard Mills, Judge.

This matter comes before this Court for its consideration of the "MOTION TO TAKE JUDICIAL NOTICE AND SUPPLEMENT THE RECORD" filed September 25, 1991, by counsel for appellant. On consideration thereof,

IT IS ORDERED that this motion is DENIED.

APPENDIX I

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 31, 1991

Before
Hon. JOHN L. COFFEY, Circuit Judge
Hon.
Hon.

Alfred H. Greening, Jr.,
Plaintiff-Appellant,

No. 90-3784 v.

Thomas J. Moran, Honorable, individually, and as Chief Justice of the Supreme Court of Illinois, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 90 C 3071—Richard Mills, Judge.

ORDER

This matter comes before the court for its consideration of the "MOTION TO SUPPLEMENT RECORD AND TAKE JUDICIAL NOTICE" filed herein on July 25, 1991, by counsel for the Attorney Registration and Disciplinary Commission. On consideration thereof,

IT IS ORDERED that the motion is GRANTED and the court will take judicial notice of the orders of the Illinois Supreme Court dated June 25, 1991 and July 22, 1991, in the matter captioned *In Re: Alfred H. Greening, Jr.* The clerk of this court will distribute copies of these orders to the merits panel with the briefs.